No. 11899

United States
Circuit Court of Appeals
for the Ninth Circuit

ERMELINDO ESCOBEDO and LEO ESCOBEDO,
Claimants of One 1947 Model Ford V 8 Station Wagon Automobile,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

Upon Appeal from the District Court of the United States for the District of Montana

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TABLE OF CASES, STATUTES AND AUTHORITIES

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BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

The statement of facts of the Appellant is accepted except as the same is controverted and extended as more fully set forth in our argument under Specification of Error No. I.

ARGUMENT

As the Appellants have presented their case in two parts, for the purpose of clarity we will do likewise, i.e., first to Specification of Error No. I, and second as to Specifications of Error Nos. II, III and IV.

SPECIFICATION NO. I

It is with reluctance that we are compelled to make a further statement of the facts, but we do not

believe that the Appellants' statement of the Government evidence is presented in its true light and certainly is contrary to the findings of fact made by the Honorable Charles N. Pray, the presiding District Court Judge. (R. p. 49-53).

There was little or no conflict in the evidence offered on behalf of the Libelant and Libelee insofar as the material elements of the case were concerned. The evidence disclosed that that in the course of the evening immediately preceding the search and seizure of said automobile, all of the adult passengers with the exception of the driver had been drinking to quite some extent. (R.p. 29-30-32-33-34-35-36-39-44-45).

The evidence of the Libelant disclosed that the Special Officer of the U. S. Indian Service charged with the suppression of liquor traffic among the Indians and in the Indian country had received in the regular mail an unsigned letter advising that the owner of the automobile had been selling liquor to the Indians, and that the passenger was bootlegging to the Indians. (R.p.22). Acting upon this information, surveillance was undertaken and after observing various occupants of the automobile placing packages in the automobile immediately after leaving a liquor establishment, the officers followed the automobile onto the Indian Reservation where the automobile was searched and the liquor found after its intro-

duction onto the reservation in said automobile. (R. p. 14-25). The District Court in its decision found that these facts gave the officer probable cause upon which to act, and search and seize the automobile involved. (R.p. 53).

The Appellants state in their brief (p. 5) that the lower Court mistakenly assumed that the cross-examination of the passenger Melendrez indicated that he had the wine with him when he walked to the automobile with the owner. While the passenger testified on direct examination that he placed the wine bottle back in the car before meeting the owner (R.p. 29), immediately thereafter on cross-examination he was given adequate opportunity to retrace his steps upon leaving the cafe where he had been drinking, and was asked upon at least four different occasions during the cross-examination whether he did anything upon leaving the cafe until he met the owner of the vehicle. He stated repeatedly that upon leaving the door of the cafe he stood on the sidewalk immediately in front of the cafe until he was joined by the owner and then after drinking together in several bars, went to the car together. (R.p. 33-35). He had previously testified that he and his drinking companions had not completely drunk one jug of wine. (R.p. 29). This partially consumed bottle was found at the time of seizure. Therefore it was clear

that he had this jug in his hand when joined by the owner. (R.p. 33-36). The drinking companion of the passenger Melendrez, upon cross-examination, testified to the identical facts corroborating the testimony given by the passenger upon cross-examination but wholly failing to corroborate the passenger's testimony given upon direct examination. (R.p. 39).

The trial Court on the subject of knowledge on the part of the owner made the following findings of fact, which for the purpose of emphasis and clarity we now quote:

> "On the subject of knowledge on the part of the owner of the car, the Government relies strongly on the testimony of Melendrez (the passenger) and Autobee (his drinking companion), developing circumstances showing that while the former was carrying the jug of wine back to the car the owner was with him, and could have seen the wine placed in the car; and since they, the owner and Melendrez, had been drinking together at the Arcade Bar, and were both going together toward the car with the latter carrying the jug of wine from which the contents had been nearly emptied, the responsibility was on the senior Escobedo (the owner) to know whether the wine was in the car; he must have seen Melendrez carrying it toward the car; they were both going to the car to drive away at this time, which was then about 11:00 o'clock at night." (Words in parenthesis mine).
>
> "Melendrez had already pleaded guilty to the criminal charge when he was called as a witness on behalf of the Escobedos, and the testimony

relating to the walk to the car with the wine was developed by the District Attorney on cross-examination. This court is of the opinion that the testimony of Melendrez and Autobee in regard to the wine drinking in the cafe, with the jug in possession of Melendrez, considered in connection with the surrounding circumstances, taking into account the reiterated positive statements made by Melendrez and Autobee as to what they did, where they went, and who they met, on leaving the cafe, brings the senior Escobedo in close contact with the jug of wine which was returned to the automobile." (R.p. 50-51).

As is often the case, a written transcript of the proceedings in court does not always reveal the true character of the evidence given orally at the trial. However, the lower District Court was the trier of the facts and unless there is a clear abuse of discretion or finding, this court should not reverse these findings, as the District Court had a better opportunity to view the witness on the stand and observe his demeanor when confronted with questions on the cross-examination.

SPECIFICATIONS OF ERROR NOS. II, III AND IV

(Law Required Forfeiture)

Counsel for Appellants in his brief has discussed the three above specifications of error together, so far the purpose of clarity we will also combine our discussion thereof.

As we view the case the only question presented to

the court under these specifications is whether or not the automobile is subject to forfeiture, the libelees having no knowledge that it contained intoxicating liquor and was used to introduce the same into the Indian country. We must repeat, however, that the Government does not concede that the owner, Ermelindo Escobedo, did not have knowledge that the passenger Ralph Melendrez placed the liquor in the car immediately before its transportation, and if this Court so finds that the owner of the automobile had knowledge of the presence of the intoxicating liquor in the automobile as indicated in our discussion of the evidence under Specification No. I, then there is no material question to be considered and the car should be confiscated.

However, even if the owner had no knowledge that his car was being used to introduce intoxicating liquor into the Indian country, it may be seized and forfeited under the authority of the **United States v. One Chevrolet Coupe Automobile (C.C.A. 9th Circuit, May 6, 1932.), 58 Fed. (2d) 235.**

In that case heard by this court, the owner of the automobile was entirely innocent of any knowledge of its use by its temporary bailees for the purpose of introducing liquor into the Indian country. The Honorable Curtis D. Wilbur, the Senior Judge of this court, stated on page 236:

"That the sole question involved in the appeal is whether or not an automobile so used for such unlawful purpose is subject to forfeiture regardless of the fact that the owner was innocent of any participation in or knowledge of the illegal use of his automobile. The question is not a new one.

"Under the original form of the legislation enacted in 1864 (13 Stat. 29) for the forfeiture of vehicles used in unlawfully introducing intoxicating liquor into the Indian country (Rev. St. § 2140, now 25 USCA § 246), it was held that it did not authorize the forfeiture of an automobile or the interest of an innocent owner in the vehicle so used. In 1917 the law was amended by adding the provisions now found in 25 USCA § 247, 39 Stat. 970, as follows:

§ 247. Vehicles subject to seizure whether used by owner or other persons. Automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or Federal statute, whether used by the owner thereof or other persons, shall be subject to the seizure, libel, and forfeiture provided in the preceding section.'

"In this amendment the clause, 'whether used by the owner thereof or other person,' was introduced for the first time, and the courts have since held that this clause was added for the express purpose of requiring the seizure and forfeiture of an automobile, regardless of the innocence of its owner. See U.S. v. One Automobile (D.C.) 237 F. 891; Shawnee Nat. Bank v. U. S. (C.C.A.) 249 F. 583; U. S. v. One Buick Roadster Automobile (D.C.) 244 F. 961; Hawley v. U. S. (C.C.A.) 15 F. (2d) 621; Commercial Investment Trust v. U. S. (C.C.A.) 261 F. 330;

> U. S. v. One Seven-Passenger Paige Car (D.C.) 259 F. 641; U. S. v. One Chevrolet Four-Door Sedan Automobile (D.C.) 41 F. (2d) 782. With this conclusion we agree."

The cases cited by Judge Wilbur and listed in the fore-going paragraph carefully analyze the development of the law in the United States resulting in the Congress of the United States amending Revised Statute 2140, now U.S.C.A. 246, by the passage of the Indian Appropriation Act approved March 2, 1917, now found in 25 U.S.C.A. 247, 39 Stat. 970. The Circuit Court of Appeals in an Oklahoma case, **Commercial Investment Trust v. United States, 261 Fed. 300,** said:

> "Paragraph IV of the Act of March 2, 1917, under which this proceeding is brought, contains following provision: "'Whether used by the owner thereof or other persons' It is very evident that it was the intent of Congress to extend the power of seizure, libel and forfeiture beyond the old section of the statute. This Act of Congress authorizes a proceeding against the property so used itself. The offense attaches to the property; the property being the offender, in that it is the means of violating the law."

The District Court of Oklahoma, in **United States vs. One Seven-Passenger Paige Car, 259 Fed. 641,** also cited above, after carefully analyzing the history and development of the pertinent statutes and the amendments thereto, said:

> "It appears to have been the intention of Con-

> gress that automobiles or any other vehicle or conveyance used in introducing or attempting to introduce intoxicants into the the Indian country, or where the introduction is prohibited by treaty or Federal statute, should be subject to seizure, libel and forfeiture, without regard to ownership."

This court quoted with approval from **United States v. One Buick Roadster Automobile, 244 Fed. 961.** See also **United States vs. One Chevrolet Four-Door Sedan, etc., 41 Fed. (2d) 782,** where the court said:

> "By such special acts Congress sought to protect the dependent Indian wards of the government against the evils of intoxicating liquors, and enacted laws to prevent the sale, barter, possession, introduction, or manufacture of such intoxicants in what was designated as Indian country. An effective means to prevent the introduction of intoxicants was to provide for the forfeiture of the vehicles employed for such purposes, without regard to the ownership or claims of persons to the automobile or vehicle. Strict measures were adopted by Congress with respect to the Indians and intoxicating liquors, and, under such statutes, forfeitures of automobiles and vehicles may be had without regard to the ownership or claims of persons to such vehicle."

Also see **Hawley v. United States, 15 Fed. (2d) 621.**

Counsel for Appellant on page 16 of his brief cited **United States v. One Ford Coupe, 71 L.Ed.321, 272 U.S. 321.** A reading of this case discloses that a similar suggestion was made to the United States Supreme Court, questioning whether there might be

a forfeiture where a stranger has surreptitiously deposited or concealed the liquor in the vehicle while in the possession and use of the owner, or had obtained possession and use of the owner, or had obtained possession of the vehicle by theft and then made use of it. The Supreme Court there said:

> "But we are not here concerned with such a state of facts and therefore may dismiss the suggestion by repeating what was said of like possibilities pressed on our attention in the Goldsmith, Jr., Grant Co. v. United States, 65 L. Ed. 379: 'Whether the indicated possibilities under the law are justified we are not called upon to consider. It has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made it will be time enough to pronounce upon it. And we also reserve opinion as to whether the section can be extended to property stolen from the owner or otherwise taken from him without his privity or consent.'"

See also **Thomas S. Dobbins v. United States, 24 L. Ed. 647, 96 U.S. 395.**

Much of the argument offered by Appellants' counsel is founded upon the same theories discussed in the Goldsmith and One Ford Coupe cases, supra. We are not here concerned with the enforcement of the Internal Revenue Code, as considered in appellants' case, **Brink vs. United States, 148 Fed. (2d) 325**, nor in the case of **United States vs. One Model H Farmall Tractor, etc., 51 F. Sup. 603**, as a reading of that case discloses that the tractor in question had

been stolen from the owner by a trespasser and was illegally used by the trespasser while the owner was asleep. This case certainly has no application here, nor has the quotation from **Goldsmith, Jr.,-Grant Co. vs. United States, 95 L. Ed. 379,** concerning the presence of liquor in a railroad Pullman car that could not be easily examined by the owner before entry into the Indian country. The citation of **People vs. One 1941 Chrysler, 162 Pac. (2d) 653,** concerns only the bailee of a motor vehicle where the owner was not present, and is not applicable to the case at bar.

We are here concerned with one member of a joint adventure placing intoxicating liquor in an automobile when there was a definite duty upon the owner to either search the automobile or question its occupants to determine the presence of intoxicating liquor before driving into the Indian country.

Throughout the Appellants' brief an attempt has been made to distinguish the case at bar from all of the cited cases upon the theory that it must be shown by the Government that the owner or operator of the automobile must have had knowledge of the transportation of the intoxicating liquor into the Indian country and that it is impossible for the automobile to be the offender. We believe that this theory on the part of the Appellants was sound when Section 2140 was first enacted in 1864, but thereafter with the improvement of the means of trans-

portation and the resulting difficulties in law enforcement, Congress saw fit to place a very definite duty upon the owner or operator of an automobile and almost without exception have held that if liquor is found in the automobile, the same is the offender and must be forefeited to the Government. If this court was to adopt the theory of the Appellants herein, it would then beb necessary for the enforcement officers to witness almost every act of the owner and operator as well as the acts of the passengers in the automobile in order to enable them to refute the attempts by the owners to have the passengers claim the ownership of liquor found in automobiles used in the introduction of the same into the Indian country. This would be a burden which we do not feel the court would be warranted in placing upon the law enforcement officer. We believe, instead, that Congress intended to place a duty upon the owner or operator to determine the presence or absence of intoxicating liquor in his automobile before etnering into the Indian country. This duty can be more fairly assumed by the operators of motor vehicles than the burden which would be placed upon law enforcement officers if the Appellants' theory herein was accepted.

The evidence discloses in the case at bar that the passenger Ralph Melendrez and the owner and operator of the car were engaged in a joint adventure

when they went to the city of Hardin, (R.p. 29, 30, 44) and we respectfully assert that it was the duty of the owner of the motor vehicle to investigate the interior of the automobile, or at least interrogate the passengers therein before driving into the Indian country, particularly where the owner knew that all of the occupants, with the exception of the driver, had been drinking for a period of several hours and that the resulting acts of the passengers might well be an attempt to carry liquor with them upon their return into the Indian country. (R.p. 44-45).

The court's attention has been directed to **United States v. One Ford Two-Door Sedan, etc., 69 F. Sup. 417**, decided by Judge Clark in the District Court, in and for the District of Idaho. This case is clearly distinguishable from the case at bar as the facts there disclosed that the owner of the vehicle had picked up a hitchiker who subsequently purchased intoxicants and placed the same in the automobile without the operator's knowledge. As Judge Clark there stated, the court was then dealing with the property rights of an Indian and a ward of the United States Government, and it is very apparent that Judge Clark differentiated that case from all others for the purpose of protecting property rights of an Indian ward.

The case at bar can be distinguished from the

Idaho case in several particulars: (1)We are not here dealing with an Indian ward of the United State; (2) The facts here disclose knowedge on the part of the owner of the presence of intoxicants in the automobile; (R. p. 33-36, 39) (3) A passenger and not a hitchhiker placed the intoxicants in the automobile; (R. p. 29) (4) The owner and passenger were engaged in a joint adventure at the time of the introduction of the intoxicants into the Indian country; (R. p. 29-36) and, (5) There was a duty upon the owner to investigate the interior of the automobile and interrogate the passengers where the owner knew all of the occupants, with the exception of the driver, had been engaged in a joint drinking party.

Both the presiding Judge in Idaho and the California court **(People vs. One 1941 Buick Sport Coupe, etc. 166 Pac. (2d) 69),** limited their opinions and decisions to cases where an innocetn owner had no knowledge, actual or implied, of the unlawful possession of a person riding in a car where there was no concert of action or joint adventure between the operator and passenger. In the case at bar, the owner had knowledge, both actual and impied and the owner and passenger were engaged in a joint adventure, resulting in a definite duty on the part of the owner to use great care and all means within his power to determine the presence of the intoxicating

liquor in the car, before entering onto the Indian Reservation.

CONCLUSION

We therefore respectfully submit that the decision of the lower court is not in error and that the forfeiture of the automobile in question should be sustained, for the following reasons:

1—The owner of the automobile had knowledge, actual and implied, of the presence of intoxicating liquor before driving onto the Indian Reservation.

2—There was a duty upon the owner to interrogate the passengers and examine the interior of the automobile before driving onto the Indian Reservation as the owner the passengers had been drinking together and were engaged in a joint adventure.

3—The applicable statutes require the seizure and forfeiture of the automobile regardless of the innocence of its owner.

Respectfully submitted,

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